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BILLINGS DIV.

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
BILLINGS DIVISION

FRANCES HARRIS,

Plaintiff,

vs.

EDWARD PARISIAN, individually and in his capacity as Area Director of Bureau of Indian Affairs; CARL E. VENNE, individually and in his capacity as Crow Tribal Chairman; THE CROW TRIBAL EXECUTIVE BRANCH, and THE CROW TRIBAL LEGISLATORS,

Defendants.

CV-06-143-BLG-RFC-CSO

ORDER and  
FINDINGS AND RECOMMENDATIONS  
OF U.S. MAGISTRATE JUDGE

Plaintiff Frances Harris ("Harris"), appearing *pro se*, initiated this action challenging the enactment and enforcement of the 2001 Crow Constitution. Harris, an enrolled member of the Crow Tribe living off of the reservation, seeks a declaratory ruling that the 2001 Crow Constitution's alleged elimination of District 7, the Off-Reservation Crow Tribal Members District, unconstitutionally eliminated the right of off-reservation tribal

members to participate in tribal matters.

Harris generally alleges that there were irregularities in the voting process that ultimately ratified the adoption of the 2001 Crow Constitution, which led to the elimination of the 7<sup>th</sup> voting district where off-reservation Crow Tribal members could vote. She also alleges the "Area Director [of the Bureau of Indian Affairs ("BIA")] was notified that there was considerable reason to believe that the vote on the 2001 Crow Constitution had been manipulated and did nothing." *Second Amended Complaint and Application for Injunctive Relief and Declaratory Judgment to Secure Rights of Enrolled Crow Tribal Members* ("2<sup>nd</sup> Am. Cmplt.") (Court's Doc. No. 21) at 6.

Harris seeks, *inter alia*, a declaratory judgment invalidating the 2001 election results, an order enjoining further action under the 2001 Crow Constitution, and an order requiring a new vote.

The following motions are pending before the Court:

1. Defendants Carl E. Venne, Crow Tribal Executive Branch, and the Crow Tribal Legislators' (hereafter "Tribal Defendants") Joint Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(h)(2), 12(h)(3) and/or Failure to Exhaust Tribal Administrative Remedies (Court's Doc. No. 16); and
2. Defendant Edward Parisian's ("Parisian") Motion to Dismiss for Lack of Subject Matter Jurisdiction (Court's Doc. No. 19).

By Order (Court's Doc. No. 18) filed February 16, 2007, United States District Judge Richard F. Cebull referred this case

to the undersigned for all pretrial proceedings pursuant to 28 U.S.C. § 636(b)(1)(A) and (B) including submission of proposed findings and recommendations.

**I. PROCEDURAL BACKGROUND**

On October 10, 2006, Harris filed a "Verified Complaint and Application for Injunctive Relief and Declaratory Judgment to Secure Rights of Enrolled Crow Tribal Members" (Court's Doc. No. 1).

On November 8, 2006, the Tribal Defendants moved for a more definite statement pursuant to Rule 12(e)<sup>1</sup> (Court's Doc. No. 8).

On December 18, 2006, United States Magistrate Judge Richard W. Anderson, to whom this case was originally assigned,<sup>2</sup> issued a *Memorandum & Order* (Court's Doc. No. 9) granting the motion and giving Harris until January 5, 2007, to file and serve her Amended Complaint.

On December 27, 2006, Harris filed her "Amended Verified Complaint and Application for Injunctive Relief and Declaratory Judgment to Secure Rights of Enrolled Crow Tribal Members" (Court's Doc. No. 10).

On January 31, 2007, the Tribal Defendants filed their Joint

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<sup>1</sup> All references to Rules herein are to the Federal Rules of Civil Procedure unless otherwise indicated.

<sup>2</sup>On January 8, 2007, this case was reassigned to the undersigned because of Judge Anderson's retirement. On February 16, 2007, Judge Cebull reassigned the case to himself and referred it to the undersigned under 28 U.S.C. §§ 636(b)(1)(A) and (B).

Motion to Dismiss. On March 2, 2007, Parisian filed his motion to dismiss.

On March 12, 2007, Harris filed a "Second Amended Complaint and Application for Injunctive Relief and Declaratory Judgment to Secure Rights of Enrolled Crow Tribal Members" (Court's Doc. No. 21) (hereafter "*2d Am. Cmplt.*").

On April 16, 2007, in addressing a Joint Motion to Stay Deadlines and Proceedings (Court's Doc. No. 22) filed by all Defendants, the Court issued an Order (Court's Doc. No. 26) staying the proceedings pending consideration of Defendants' motions to dismiss.

## **II. DISCUSSION**

### **A. Standard of Review**

In considering a motion to dismiss pursuant to Rule 12(b), the Court must accept as true all well-pleaded allegations of fact in the complaint and construe them in the light most favorable to the plaintiff. Burgert v. Lokelani Bernice Pauahi Bishop Trust, 200 F.3d 661, 663 (9<sup>th</sup> Cir. 2000). Dismissal for failure to state a claim is appropriate if it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

**B. The Tribal Defendants' Motion to Dismiss**

**1. Parties' Arguments**

In support of their motion to dismiss, the Tribal Defendants first argue that Harris has failed to allege a valid jurisdictional basis to invoke federal court jurisdiction. They argue that Harris's reliance on the Fourteenth Amendment to the U.S. Constitution is misplaced because Tribes, as sovereigns, "are unconstrained by constitutional limitations on state and federal governments such as the Bill of Rights, and the 5<sup>th</sup> and 14<sup>th</sup> Amendments." *Memorandum in Support of the Tribal Defendants' Motion to Dismiss* (Court's Doc. No. 17) ("Tribal Defts' Br.") at 6-10. Rather, they argue, Tribes are constrained only by Congressional acts such as the Indian Civil Rights Act ("ICRA"), which provides relief only through habeas corpus and therefore is not applicable here. *Id.* Thus, they argue, Harris has failed properly to invoke the Court's jurisdiction and her action should be dismissed. *Id.*

Second, the Tribal Defendants argue that the Court lacks subject matter jurisdiction because the Tribal Defendants are immune from suit. They argue that neither Congress nor the Tribal Defendants have waived the Tribal Defendants sovereign immunity, and it bars the relief Harris seeks. *Id.* at 10-14.

Third, the Tribal Defendants argue that Harris has failed to exhaust tribal remedies. This failure to exhaust, they argue,

compels dismissal. *Id.* at 14-15.

In response to the Tribal Defendants' motion, Harris makes four arguments. First, she argues that the 2001 Crow Constitution states that it establishes a judicial branch, along with executive and legislative branches of government, but that there is no further mention of the judicial branch in the new constitution or in the By-Laws. *Plaintiff's Response to Motions to Dismiss for Lack of Subject Matter Jurisdiction* (Court's Doc. No. 24) ("Harris's Resp.") at 3.

Second, Harris argues that the "Crow Indian Council did not vote to accept the ICRA." *Id.*

Third, Harris argues that she "has no reason to believe that there is a court of proper jurisdiction where none is defined either by accepted statute, accepted act of the United States Congress ... or constitutional definition other than the courts set forth in the United States Constitution accepted by Treaty in 1868, of which this Federal District Court is one." *Id.*

Fourth, Harris argues that "the United States involves itself regularly in matters of apparent tyranny all over the world to make right matters of constitutional injustice, of which the original complaint and the amended complaints speak." *Id.*

## **2. Analysis**

The United States Supreme Court has held that exhaustion of tribal remedies ". . . is required before . . . a claim [that

involves tribal matters] may be entertained by a federal court."

National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 857 (1985). Comity requires that tribal court remedies be exhausted before a federal district court considers disputes in a civil case that involves tribal-related activities. Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 14-16 (1987).

Deference to tribal courts, however, is not absolute. "Exhaustion is prudential; it is required as a matter of comity, not as a jurisdictional prerequisite." Boozer v. Wilder, 381 F.3d 931, 935 (9<sup>th</sup> Cir. 2004) (citing Strate v. A-1 Contractors, 520 U.S. 438, 451 (1997) and LaPlante, 480 U.S. at 16, n.8). "Exhaustion is not required where 'the action is patently violative of express jurisdictional prohibitions' or it is otherwise plain that the tribal court lacks jurisdiction over the dispute, such that adherence to the exhaustion requirement would serve no purpose other than delay." Id. (citations omitted). Also, a party need not exhaust "where an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith ... or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction." Id. (citing Nat'l Farmers Union, 471 U.S. at 856, n.21). Further, "[c]ase law supports the notion that if there is no functioning tribal court, exhaustion would be futile and therefore would not be required." Krempel v. Prairie Island

Indian Community, 125 F.3d 621, 622-23 (8<sup>th</sup> Cir. 1997) (citations omitted).

In the case at hand, Harris has not alleged that there is no tribal court that could address her claims. Rather, she alleges only that she "has no reason to believe that there is a court of proper jurisdiction ...." *Harris's Resp.* at 3. Her "belief" is undermined by this Court's determination in previous cases that there exist both a Crow Tribal Court and a Crow appellate court. See Old Bull v. Norton, CV-02-27-BLG-RFC (D. Mont. 2002) (Order filed August 12, 2002, Court's Doc. No. 39) (expressly finding existence of a "fully functioning Crow Tribal Court"); Gros Ventre v. Birdinground, CV-02-23-BLG-RFC (D. Mont. 2002) (Order filed June 11, 2002, Court's Doc. No. 16) (noting that "[a]ll the facts and circumstances in this matter indicate that while there has been some political upheaval in the Crow Tribal system, the Crow Tribal Court and the Appeals Court are still in existence and functioning"). Harris has offered no other explanation or argument to indicate that exhaustion of tribal remedies would be inappropriate.

The issues raised in this case are important to the Crow Tribe. Whether the 2001 Crow Constitution was legitimately ratified, and the scope of the document's legal force, are significant issues that should be addressed, in the first instance, in Crow Tribal Court.

Harris has failed to exhaust tribal court remedies. Thus, the Court lacks jurisdiction to entertain her action.<sup>3</sup> Accordingly, the Court will recommend that the Tribal Defendants' motion to dismiss be granted.

**C. Parisian's Motion to Dismiss**

**1. Parties's Arguments**

Parisian moves to dismiss Harris's claims against him and the United States on the ground that the Court lacks subject matter jurisdiction. He raises three primary arguments in support of dismissal.

First, Parisian argues that Harris, who is suing him in his individual capacity, has asserted no facts establishing a basis for any claim against him in his individual capacity, and that he should be dismissed. He argues that Harris, who also is suing him in his official capacity, is actually seeking a declaratory judgment against the BIA, an agency of the United States. As such, he argues, there must exist a waiver of sovereign immunity and a basis for federal jurisdiction, and neither are present here. Federal courts repeatedly have held, he argues, that there is no federal question jurisdiction to resolve internal tribal voting disputes. *Parisian's Brief in Support [of] Motion to Dismiss for Lack of Subject Matter Jurisdiction* (Court's Doc. No.

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<sup>3</sup>Having so concluded, the Court does not address the Tribal Defendants' other arguments for dismissal.

20) ("Parisian's Br.") at 2, 3-4.

Second, Parisian argues that, even if Harris's claims against the BIA could be read to invoke the Administrative Procedures Act ("APA"), sovereign immunity under the APA is not waived for matters that can be addressed elsewhere or that would conflict with other statutes. Here, Parisian argues, Harris has an adequate remedy for her claims in tribal court. Also, Congress expressly limited federal court jurisdiction in Native American civil rights cases under the Indian Civil Rights Act ("ICRA") to writs of habeas corpus. Thus, Parisian argues, any waiver of sovereign immunity in this case would conflict directly with the ICRA's limited grant of federal jurisdiction. *Id.* at 2-3, 4-9.

Third, Parisian argues that, even were the Court to find that it has subject matter jurisdiction, the Crow Tribe is an indispensable party. The Tribe has immunity as a quasi-sovereign government, Parisian argues, so the case would not be permitted to proceed. *Id.* at 3, 9.

In response, Harris makes the same four arguments listed *supra* that she made in response to the Tribal Defendants' motion. *Harris's Resp.* at 3.

## **2. Analysis**

### **a. Individual Capacity Claims Against Parisian**

As an initial matter, the Court concludes that Harris has

failed to allege facts sufficient to sustain any claim against Parisian in his individual capacity. In his *Memorandum & Order* (Court's Doc. No. 9) filed on December 18, 2006, Magistrate Judge Anderson advised Harris of this deficiency in her complaint and, despite two attempts to amend, she has not succeeded in adequately apprising Parisian of the claims against him in his individual capacity. Harris is required to set forth the specific facts upon which she relies in claiming the liability of each Defendant. Fed. R. Civ. P. Rule 8(a)(2); Ivey v. Board of Regents, 673 F.2d 266, 268 (9th Cir. 1982). Her failure to do so here compels the Court to recommend that all claims against Parisian in his individual capacity be dismissed.

***b. Official Capacity Claims Against Parisian***

With respect to Harris's claims against Parisian in his official capacity, any claims against a federal officer or employee in his or her official capacity are actually claims against the United States. Balser v. Department of Justice, 327 F.3d 903, 907 (9<sup>th</sup> Cir. 2003) (citing Sierra Club v. Whitman, 268 F.3d 898, 901 (9<sup>th</sup> Cir. 2001)). The United States, as a sovereign, is immune from suit unless it has waived its immunity. F.D.I.C. v. Meyer, 510 U.S. 471, 475 (1994) ("Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit"); Gilbert v. DaGrossa, 756 F.2d 1455, 1458-59 (9<sup>th</sup> Cir. 1985) (a suit against officers and employees of the

United States in their official capacities is essentially a suit against the United States, and the bar of sovereign immunity applies). Any waiver of sovereign immunity must be "unequivocally expressed" in the text of a statute and will not be implied. Lane v. Pena, 518 U.S. 187, 192 (1996) (citations omitted). The party suing the United States bears the burden of demonstrating an unequivocal waiver of sovereign immunity. See Holloman v. Watt, 708 F.2d 1399, 1401 (9<sup>th</sup> Cir. 1983).

In the case at hand, Harris has not demonstrated that the United States has waived sovereign immunity. She has failed to cite to any statute that "unequivocally expresses" waiver.

Even liberal construction of Harris's *pro se* pleadings with an interpretation that she seeks review of an agency action under the APA provides her with no help. "[T]he APA does not independently confer jurisdiction on the district courts." Gallo Cattle Co. v. United States Dept. of Agriculture, 159 F.3d 1194, 1198 (9<sup>th</sup> Cir. 1998). Also, the APA waives sovereign immunity only where: (1) claims are not for money damages; (2) an adequate remedy for the claims is not available elsewhere; and (3) claims do not seek relief expressly or impliedly forbidden by another statute. Tucson Airport Authority v. General Dynamics Corp., 136 F.3d 641, 645 (9<sup>th</sup> Cir. 1998).

Here, Harris has an adequate remedy for her claims in Crow Tribal Court. See Old Bull v. Norton, CV-02-27-BLG-RFC (D. Mont.

2002) (Order filed August 12, 2002, Court's Doc. No. 39) (expressly finding existence of a "fully functioning Crow Tribal Court"); Gros Ventre v. Birdinground, CV-02-23-BLG-RFC (D. Mont. 2002) (Order filed June 11, 2002, Court's Doc. No. 16) (noting that "[a]ll the facts and circumstances in this matter indicate that while there has been some political upheaval in the Crow Tribal system, the Crow Tribal Court and the Appeals Court are still in existence and functioning"). Thus, the APA does not operate to waive the United States' sovereign immunity in this instance.

Based on the foregoing, the Court finds that sovereign immunity bars Harris's claims against Parisian in his official capacity.<sup>4</sup> The Court, therefore, will recommend that Parisian's motion to dismiss be granted.

**III. CONCLUSION**

Based on the foregoing,

**IT IS ORDERED** that the stay is hereby LIFTED. Also,

**IT IS RECOMMENDED** that:

1. Defendants Carl E. Venne, Crow Tribal Executive Branch, and the Crow Tribal Legislators' (hereafter "Tribal Defendants") Joint Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(h)(2), 12(h)(3) and/or Failure to Exhaust Tribal Administrative Remedies (Court's Doc. No. 16) be GRANTED, and that the claims against them be DISMISSED without prejudice; and

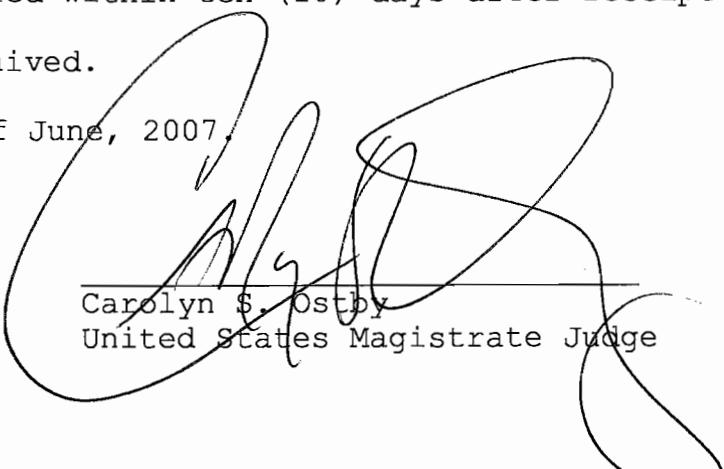
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<sup>4</sup>Having so found, the Court does not address Parisian's other arguments for dismissal.

2. Defendant Edward Parisian's ("Parisian") Motion to Dismiss for Lack of Subject Matter Jurisdiction (Court's Doc. No. 19) be GRANTED, and that the claims against him be DISMISSED with prejudice.

**NOW, THEREFORE, IT IS ORDERED** that the Clerk of Court shall serve a copy of the Findings and Recommendations of the United States Magistrate Judge upon the parties. The parties are advised that, pursuant to 28 U.S.C. § 636, any objections to these findings must be filed within ten (10) days after receipt hereof, or objection is waived.

DATED this 26<sup>th</sup> day of June, 2007.



Carolyn S. Ostby  
United States Magistrate Judge